DOCKET

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

PROCEEDINGS AND ORDERS DATE: 120485

CASE NBR 85-1-00035 CFY CASE STATUS: DECIDED
SHORT TITLE Greber, A. Alvin DOCKETED: Jun 28 1985
VERSUS United States

Entry	Date	Note	Proceedings and Orders
1	Jun 28 1985	D	Petition for writ of certiorari filed.
3	Aug 8 1985		Order extending time to file response to petition until September 9, 1985.
4	Sep 10 1985		Order further extending time to file response to petition until October 9, 1985.
5	Sep 25 1985		Brief of respondent United States in opposition filed.
6	Oct 9 1985		DISTRIBUTED. November 1, 1985
8	Nov 4 1985		REDISTRIBUTED. November 8, 1985
9	Nov 12 1985		Petition DENIED. Dissenting opinion by Justice White. (Detached opinion.)

****

PETITION FOR WRIT OF CERTIORARI

85- 350

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

A. ALVIN GREBER,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit (C.A. No. 84-1546; E.D. Pa. Cr. No. 83-414-1)

PETITION FOR WRIT OF CERTIORARI

Thomas B. Rutter, Esquire
Alan A. Turner, Esquire

RUTTER, TURNER & STEIN
872 Public Ledger Building
Independence Square
Philadelphia, PA 19106
(215) 925-9200

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

HBP

I. QUESTIONS PRESENTED FOR REVIEW

A. Did the lower court correctly interpret the amended provisions of the Medicare fraud statute, 42 U.S.C. §1395nn(b)(2)(B), in affirming Petitioner's conviction?

B. Did the lower court correctly hold that even though "materiality" is an essential element of the false statements statute, 18 U.S.C. §1001, materiality is an issue of law to be decided by the court as distinguished from a factual issue for the jury's determination?

C. Did the lower court correctly hold that Petitioner was not entitled to a hearing concerning alleged private communications between a government witness and the jury?

II. TABLE OF CONTENTS

TABLE OF CONTENTS—*(Continued)*

III. PETITION FOR WRIT OF CERTIORARI

Petitioner A. Alvin Greber prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit (C.A. No. 84-1546) which affirmed the judgment of conviction entered upon a jury verdict in the United States District Court for the Eastern District of Pennsylvania.

IV. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit concerning which this Court's review is sought is reported at *United States v. Greber*, 760 F.2d 68 (3rd Cir. 1985), and is reproduced in the Appendix hereto at pp. A1-A10.

The United States District Court for the Eastern District of Pennsylvania, without opinion, denied Petitioner's post-trial motions in an unpublished order which is reproduced in the Appendix hereto at p. A11.

V. TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—*(Continued)*

TABLE OF AUTHORITIES—*(Continued)*

VI. JURISDICTIONAL STATEMENT

Petitioner requests this Court to review the judgment of the United States Court of Appeals for the Third Circuit filed April 30, 1985 affirming Petitioner's convictions for mail fraud (18 U.S.C. §1341), false statements (18 U.S.C. §1001) and Medicare fraud, 42 U.S.C. §1395nn(b)(2)(B). This Petition for Certiorari is being filed within sixty days of the date of the judgment of affirmance as is required by Rules 20.1 and 20.4 of the Rules of the Supreme Court of the United States. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

VII. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Title 42 United States Code 1395nn(b)(2)(B) provides:

> "(b) Illegal Remunerations
>
> (2) Whoever knowingly and willfully offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person
>
> * * *
>
> (B) to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under this subchapter,
>
> shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both."

The Fifth Amendment to the United States Constitution provides:

"[N]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

VIII. STATEMENT OF THE CASE

A. Procedural History

On December 15, 1983 a United States Grand Jury sitting in the Eastern District of Pennsylvania returned an indictment against Petitioner A. Alvin Greber, a Doctor of Osteopathy and Board-certified specialist in both internal medicine and cardiology, charging various violations of the mail fraud statute (18 U.S.C. §1341), the false statements statute (18 U.S.C. §1001) and the Medicare fraud statute (42 U.S.C. §1395nn(b)(2)(B)). Following certain defense motions a superseding indictment was returned on March 1, 1984. The superseding indictment charged that on four occasions (counts 1 through 4) Petitioner violated the mail fraud statute by submitting billings (and receiving payments in connection therewith) for four separate "brief visits"[1] allegedly made to hospitalized patients of Petitioner, which brief visits did not occur. Petitioner was convicted of these four counts.

Counts 5 through 11, again charging violations of the mail fraud statute, alleged that Petitioner submitted

1. "Brief visits" is a phrase of art for Medicare/Medicaid and insurance billing purposes, to be distinguished, for billing purposes, from "extended visits" and intermediate visits.

billings in connection with seven Holter monitor diagnostic procedures[2] for seven separate patients, which Holter monitors were not medically indicated for such patients. Petitioner was acquitted of counts 6 and 11 and convicted on the balance of these counts.

Counts 12 through 18, charging violations of the false statements statute, alleged that Petitioner caused Cardio-Med, Inc. ("Cardio-Med") to submit billings for Medicare patients for Holter monitors, while falsely certifying thereon that each of the Holter monitors had been in operation for at least eight hours.[3] The trial jury acquitted Petitioner of Count 12 and convicted on the balance of these counts.

Finally, counts 19 through 23 of the superseding indictment, charging violations of the Medicare fraud statute, 42 U.S.C. §1395nn(b)(2)(B), alleged that Petitioner had caused Cardio-Med to pay "a remuneration or kickback" to a physician who utilized the technical services of Cardio-Med in connection with Holter monitoring (counts 19 through 22) and had caused Cardio-Med to offer "remunerations" to physicians to induce them to utilize the technical services of Cardio-Med (count 23). Petitioner was convicted on all of these counts.

Timely post-trial motions were denied on September 11, 1984 without written opinion (A11). On September 14, 1984 Petitioner was sentenced to a six month term of imprisonment on each of Counts 1 through 5 and 7 through 10, each to run concurrently with all others, and was fined $10,000 on each of Counts 13 through 22, for a total of $100,000 in fines. Concurrent five year terms of probation, to commence upon Petitioner's release from

2. See *infra*, p. 11, for a description of the holter monitor diagnostic procedure.

3. Duration of operation — i.e., eight hours or more — is relevant for Medicare/Medicaid billing purposes and, it is agreed by the trial court and the government, a "material" element necessarily to be established by the prosecution in order for the conviction of Petitioner on counts 13 through 18 to stand.

incarceration, were imposed on Counts 13 through 23 inclusive.

Petitioner prosecuted a timely appeal to the United States Court of Appeals for the Third Circuit which, on April 30, 1985 affirmed the judgment of conviction and sentence in all respects. *United States v. Greber,* 760 F.2d 68 (3rd Cir. 1985) (A1-A10).

B. Factual History.

Petitioner is an osteopathic physician Board-certified in internal medicine and cardiology. The indictment giving rise to this Petition concerns the billing practices of Petitioner as an individual medical practitioner and the billing practices of Cardio-Med, a Pennsylvania corporation, of which Petitioner was President and a 50% shareholder.

Cardio-Med, among other things, engaged in the business of supplying, scanning and reporting upon dynamic electrocardiograms — commonly known as Holter monitors. A Holter monitor is a tape recording device worn by the patient which records cardiac activity via electrodes over a period of approximately twenty-four hours on a cassette magnetic tape. A scanning device employing computer technology reviews the tape recorded cardiac activity and identifies — and prints out upon request — any unusual cardiac activity, such as arrythmias. Cardio-Med, utilizing cardiac technicians, then prepares a non-diagnostic report setting forth the results of the computer scanning (including cardio strips) which is forwarded to the physician ordering the Holter monitor procedure.

Depending upon the referring physician's preference, Cardio-Med's billing procedure varied. First, if so requested, Cardio-Med would bill the referring physician for the above-described technical component of the Holter monitor procedure in an agreed upon amount. Trial testimony established that approximately thirty

percent of the physicians utilizing Cardio-Med elected this billing procedure.

Alternatively, at the request of a referring physician, Cardio-Med would bill either Medicare or an insurance company for the entire Holter monitor procedure (both Cardio-Med's technical component and the referring physician's interpretation fee) and thereafter, out of funds collected from either Medicare or the insurance company, forward to the referring physician an amount equal to forty percent of the amount collected, up to a maximum of $65.00. Approximately seventy percent of the referring physicians elected this billing method.[4] It was this latter billing procedure which was the subject of the Medicare fraud counts and which is drawn into question in this Petition.

Under the Social Security Act, the Medicare program is administered by the Health Care Financing Administration ("HCFA"). In Pennsylvania, HCFA has designated Pennsylvania Blue Shield as the fiscal intermediary. That is, pursuant to contract, Pennsylvania Blue Shield administers the billings and disbursements for the federal government under the Medicare program.

As a result of this third party billing practice engaged in by Cardio-Med (i.e., consolidated billing on behalf of both itself and the referring physician) the government contended that Petitioner "knowingly and willfully" caused Cardio-Med to pay to (and to offer to pay to) referring physicians "a remuneration or kickback" from Medicare funds in order to "induce" the referring physician "to utilize the services of Cardio-Med for Medicare patients. . ." (R. 31)[5].

4. The record shows that no other bills were submitted (or payments received) by the referring physician in connection with the Holter monitoring or their professional services rendered in interpreting the Holter monitor in light of their patient's symptoms and medical history.

5. The Appendix filed in the court below is cited herein as "R. ____".

The trial court instructed the jury that one of the elements of the Medicare fraud offenses required proof that Petitioner caused the Cardio-Med payments with the intent to induce the referring physicians to use the services of Cardio-Med. The trial court also instructed that the fact that referring physicians interpreted, or were required to interpret the Holter monitor results, was"immaterial" if the jury were to find "that the purpose of the fee was to induce physicians to order services from Cardio-Med." (R.860) The court further instructed that the jury should consider all of the evidence as to services allegedly performed by referring physicians in determining "whether the fee had a probative purpose." (R.860) "That is[,]" — the court continued — "that the purpose was to induce the physicians to order services from Cardio-Med." (R.860).

In response to objections from both the government and the defense, the jury charge was supplemented to include the instruction that if the government proved beyond a reasonable doubt that inducement was the purpose of the fee, "the fact that the fee may, in the mind of the Defendant or the other physicians or in fact have other purposes, as well, would not be relevant (sic)" (R.884).

Further, the trial court's jury instructions regarding the elements of the false statement counts[6] (18 U.S.C. §1001), removed the element of materiality from the jury's consideration.[7]

---

6. Pennsylvania Blue Shield regulations were amended shortly before the indictment period to require at least eight hours of monitoring for payment as a dynamic electrocardiogram. Scans, in fact shorter than eight hours, but nonetheless certified as being of the necessary eight hour length, formed the factual predicate for these offenses under 18 U.S.C. §1001.

7. The Petitioner submitted requests for charge concerning both of these issues which were refused. Timely objections were made immediately following the Court's charge, but supplemental

Finally, during the rebuttal phase of the trial, the government recalled one Antoinette Revel as a witness to the witness stand. Revel was a Pennsylvania Blue Shield employee involved with the administration of the Pennsylvania Blue Shield reimbursement program. During a sidebar discussion involving the Court, counsel and the court reporter, it appeared that Ms. Revel was directly speaking to the jury from the witness stand out of the presence and out of the hearing of the court, of the court reporter and of counsel. As soon as this "fact" came to the attention of Petitioner's counsel (from a court observer), an objection was duly made. Out of the presence of the jury, the trial court briefly questioned Ms. Revel who denied having spoken to the jury. Post-trial motions which, *inter alia*, requested a hearing in connection with this Revel incident were denied (A11).

Other aspects of the trial proceeding, as relevant to each of the three questions presented in this Petition, are set forth *infra*.

IX. REASONS FOR GRANTING THE WRIT.

A. The Medicare Fraud Statute.

The court of appeals below authored the first substantive decision[8] dealing with the 1977 amendments to

---

instructions were either refused or did not cure the underlying problem. Both of these issues have thus been properly preserved for review.

8. In three decisions, the Ninth Circuit reviewed convictions arising under the 1977 amendments. See *United States v. Stewart Clinical Laboratory, Inc.*, 652 F.2d 804 (9th Cir. 1981); *United States v. Fekri*, 650 F.2d 1044 (9th Cir. 1981); *United States v. Duz-Mor Diagnostic Laboratory, Inc.*, 650 F.2d 223 (9th Cir. 1981). None of these decisions address the proper construction or application of the amendments implicated in this case.

the Medicare fraud statute.[9] In rendering the first significant judicial interpretation of this Act, the Third Circuit held that if even one purpose of a payment from one Medicare reimbursee to another health care provider was to induce the referral of work, the statute has been violated, 760 F.2d at 69. This is so, the court reasoned, "even if the payments were also intended to compensate for professional services." In other words, the payment of a fee to one who fully earned it, if the jury found comcomitant inducement, however slight, results in a criminal violation. As is shown below, the lower court's construction and application of this important statute was incorrect as a matter of law. Because this question is of great importance to the entire medical community and has not previously been addressed by this Court, *certiorari* should be granted pursuant to Supreme Court Rule 17.1(c).

In considering the background of this case, it must be noted that the court below reached its conclusion disregarding the Congressional mandate that the sole purpose of the payment, in order to constitute criminality, be inducement on the basis of two factually erroneous premises:

First, the lower court stated that the trial record contained evidence that physicians received interpretation fees "even though [Petitioner] had actually evaluated the monitoring data." 760 F.2d at 70. The inference which seems to flow from this assertion is that the ordering and referring physician (e.g., Dr. Avallone) did not interpret and evaluate the cardiac monitoring data. Such an inference, however, is absolutely contrary to the trial record. Dr. Avallone repeatedly testified that the payment which he received was earned by him in that, in each

9. The statute was amended in 1977 (Pub.L. 95-142, §4(a), 91 Stat. 1179) to essentially its present form. The words "knowingly and willfully" were added by a 1980 amendment (Pub.L. 96-499 Title IX, §917, 94 Stat. 2625).

instance of Cardio-Med Holter monitor usage, he received the Holter monitor report from Cardio-Med, rendered his own interpretation and diagnosis based thereon, and met with the patient and prescribed a plan of treatment. And for all of these medical services, Dr. Avallone did not render a single bill to either Medicare, an insurance carrier or the patient. The only fee he received for installing and disconnecting the monitor, reviewing and interpreting the report, diagnosing the patient's condition and rendering a plan of treatment based thereon was the modest fee he received from Cardio-Med when Cardio-Med billed Medicare, through Pennsylvania Blue Shield, for the entire diagnostic procedure applicable to a dynamic electrocardiogram.

Second, the lower court stated that "the fixed percentage paid to the referring physician was more than Medicare allowed for such services." 760 F.2d at 70. The trial record does not support this conclusion;[10] even the government's brief before the court below did not assert such a fact.

The Third Circuit's construction of the statute does not follow from the legislative history or the language of the Act and renders the Act so broad as to ensnare the purely innocent.

In arriving at its statutory interpretation conclusion, the lower court first turned to the legislative development of the statute. It reasoned that Congress intended

10. The only relevant evidence came from a former employee of Cardio-Med who stated that without knowing additional facts concerning the discrete payments, he could not render an opinion concerning the comparative billings. Also, Petitioner himself testified that the payments to the referring physicians under the third party billing practice of Cardio-Med resulted in the referring physician's being paid far less than had the referring physician directly billed Medicare for the professional component of the dynamic electrocardiogram (but the referring physicians who opted for this billing procedure did so in lieu of themselves performing — or having an employee to perform — the administrative services necessary to bill for, and collect, payment from Medicare).

to expand not only the penalty provisions[11] but also the coverage of the Act by the 1977 amendments. The government urged "that Congress intended to combat financial incentives to physicians for ordering particular services patients did not require." *Id.* at 71. And in adopting the government's view, the court below reasoned that: "even if the physician performs some service for the money received, the potential for unnecessary drain on the Medicare system remains." *Id.* at 71.

There is no increased potential for Medicare abuse by the payment system which operated, in an above board fashion, in Petitioner's case. There was no contention and there was no evidence that the patients who received the Holter monitor diagnostic procedures specified in counts 19 through 22 of the superseding indictment did not need those services. By the payment procedure followed in this case, Dr. Avallone, the recipient of the shared fee, did not profit beyond what he would have profited had he billed the entire procedure and paid Cardio-Med for the technical services component of the fee, or had he and Cardio-Med each separately billed their own fee components. There was no evidence that Avallone did not earn the fee which he was paid. In response to this latter point the trial court specifically instructed the jury that the fact that Avallone may have earned this fee was "immaterial" to the jury's consideration of Petitioner's guilt.

One of the chief proponents of the 1977 amendments in the House was Representative Rostenkowski. In connection with the House debate concerning H.R. 3, the predecessor to Pub.L. 95-142, Representative Rostenkowski stated:

---

11. The 1977 amendments changed the penalty provisions of the Act from that of a misdemeanor to that of a felony. The potential imprisonment was increased from one year to five years, and the fine limitation was increased from $10,000 to $25,000. 42 U.S.C. §1395nn(b)(2)(B), as amended.

> "In broadening these criminal provisions, [the] Committee sought to make clear that kickbacks are wrong no matter how a transaction might be constructed to obscure the true purpose of a payment. . . . We are in a complex area where right and wrong are often clouded with shades of gray. In such situations, the Committee stresses the need to recognize the substance rather than simply the form of a transaction should be controlling." 123 *Cong. Rec.* H9818 (1977).

An examination of the substance of the Dr. Avallone transactions proved at trial (counts 19-22) reveals that no crime was committed by Petitioner because Dr. Avallone was paid for services actually rendered by him to the Medicare patient. The purpose of the 1977 amendments — the elevation of substance over form — was intended to settle the split of decisional authority which developed concerning the meaning of the terms "kickback" and "bribe". Compare *United States v. Tapert*, 625 F.2d 111 (6th Cir. 1980), and *United States v. Hancock*, 604 F.2d 999 (7th Cir. 1979), with *United States v. Porter, 591 F.2d 1048 (5th Cir. 1979), and United States v. Zacher*, 586 F.2d 912 (2d Cir. 1978).[12]

---

12. Also of relevance are the remarks of Senator Curtis, a member of the Senate Finance Committee which had responsibility for S.143, also a precursor of Pub.L. 95-142, in floor debate on September 30, 1977:

> "First, we should be careful that honest, extremely dedicated medical providers are not tarred with the brush of alleged abuse or the ink of massive new Federal regulations. More harm can be and has been done in the name of alleged good, and we should be vigilant against both administrative excesses and undesirable or unwarranted policy implications." 123 Cong.Rec. S31,769 (1977)

It seems only reasonable that if Dr. Avallone received payment for the fair market value of his services, Senator Curtis' fears were real from Petitioner's perspective.

The entire focus of the amended Act is to define inclusively and to criminalize conduct whereby a medical equipment or services provider is *improperly* caused to use the services of another health care provider, thus increasing the system costs of the Medicare program. This reasoning flows from the 1980 amendments to the Act whereby the phrase "knowingly and willfully" was added following the opening word "whoever". 42 U.S.C. §1395nn(b)(2), P.L. 96-499, Title IX, Section 917, 94 Stat. 2625. This phrase —knowingly and willfully — has always been interpreted by the courts to require proof of a criminal intent. *Morissette v. United States*, 342 U.S. 246, 271-73 (1951). As a matter of law, Petitioner urges, the conduct involved in this case cannot have been intended to be criminal if all Cardio-Med did was to pay Dr. Avallone (Counts 19 through 22) — and offer to pay others (Count 23) — for the reasonable value of their services. Thus, the trial court clearly erred when it instructed the jury "that it is immaterial that these physicians interpreted or [were] required to interpret the holter monitoring results (sic)" in connection with the jury's consideration of Petitioner's guilt.

The construction placed upon this statute by the court below (and by the trial court) criminalizes a wide variety of conduct which should not be considered criminal under the statute. For example, the trial record demonstrates that among the services provided to referring physicians by Cardio-Med were messenger services for pickup of the completed cardiac tape recording and delivery services the next day for the written report containing the results of the computer scan of this tape recording. These messenger services were provided by Cardio-Med to increase the utility of the Cardio-Med services, to give Cardio-Med a competitive edge in the Holter monitor field and thus to "induce" referring physicians to utilize the services of Cardio-Med as distinguished from other Holter monitor services. Under the Third Circuit's interpretation of the Act, this aspect of

Cardio-Med's business was unlawful because Cardio-Med offered a "remuneration". . . "indirectly" . . . "in kind" . . . "to induce" . . . a referring physician to order a service for which payment would be made from Medicare funds.

Similarly, had Cardio-Med not paid to the referring physician funds reflecting that portion of the fee earned by the referring physician but instead had simply, as one of its many services, offered to prepare the necessary billing paperwork for the referring physician, such that the referring physician needed only to sign the request for payment and submit that request in a stamped, addressed envelope also supplied by Cardio-Med, Cardio-Med again would have violated the statute because it offered a remuneration "indirectly", "in kind", as an inducement to use its service.[13]

A final example, the facts of which are not at all implicated in the trial record of this case, also illustrates the potential implications for the health care community as a result of the Third Circuit's interpretation of the Act. Assume that the XYZ Orthopedic Group owned the office building in which it utilized office space, which building contained additional rental space. Assume that the ABC Radiology Group desired to perform the radiology services for the XYZ Orthopedic Group and, accordingly, rented and maintained office space in the XYZ building so that the ABC Radiology Group would be the most convenient radiology service for the XYZ patients. Assume further that the lease agreement between the ABC Radiology Group and the XYZ Orthopedic Group constituted an arms-length lease transaction and that lease payments reflected the fair market value of the space. This arrangement, under the Third Circuit's construction of the statute, and under the district court's jury

13. This would be an "in kind" payment because it would be intended to — and would in fact — reduce the referring physician's clerical expenses.

charge, could easily constitute a violation of the statute if any of the radiology group's billings were directed to Medicare funds. That is, the ABC Radiology Group would have paid a remuneration indirectly in cash or in kind to induce the orthopedic group to use its services.

The three examples set forth above, while perhaps representing the extreme, demonstrate that Congress could not have intended this statute to cover the situation in this case.

The Health Care Financing Administration ("HCFA"), the agency charged with the responsibility of administering the Medicare program, appears to have interpreted the Act differently than has the court below. In September 1984, HCFA issued an intermediary letter[14] interpreting 42 U.S.C. §1395(b)(2)(B) in the context of the financial relationship between durable medical equipment suppliers ("DMEs") and respiratory therapists. Intermediary Letter, (1984-2 Transfer Binder) *Medicare and Medicaid Guide* (CCH) ¶34,127, p. 10,046 (September 1984). At issue was the lawfulness of payments by DMEs to respiratory therapists for the referral of the therapists' institutionalized patients to DMEs for home care equipment. This September 1984 intermediary letter correctly opined that it would be unlawful for a DME to pay to a respiratory therapist money in exchange for the referral by the therapist of a patient or customer to the DME.

A more difficult question was presented, however, in connection with the situation where the therapist both referred the customer to the DME and also provided services to the customer and the DME such as setting up the equipment, instructing the patient in the use of the equipment and performing maintenance on the equipment. The letter also stated that "the [office of

14. An intermediary letter is a form of letter supplied by HCFA to a fiscal intermediary, such as Pennsylvania Blue Shield in this case, for further transmission by the fiscal intermediary to health care providers.

investigation] regional office will carefully review such arrangements to determine whether payments made to the therapist for any services performed include compensation for the referral of patients to the supplier." *Id.* at 10,047. This sentence implies that if the therapist has fully earned, on a fair market basis, the payment received, even if the payment is made in connection with a patient or customer referred by the therapist, there would be no statutory violation. Additionally, however, the September 1984 fiscal intermediary letter stated:

> ". . .The opportunity to generate a fee itself is a form of remuneration. The offer or receipt of such fee opportunities is illegal if intended to induce a patient referral. Thus, a supplier who induces patient referrals by offering therapists feegenerating opportunities is offering illegal remuneration, even if the therapist is paid no more than his or her usual fee." *Id.*

This construction of the statute is, of course, consistent with the trial court's charge to the jury and the Third Circuit's interpretation of the Act.

However, *the three sentences set forth above were intentionally deleted by HCFA in the program memorandum issued in April 1985.* HCFA explained the deletion as follows:

> "This Intermediary Letter supersedes Transmittal No. B-84-9, issued in September 1984. We are making this substitution in order to delete the last three sentences of the middle paragraph on page 2 of the earlier transmittal. We have received a number of inquiries regarding the meaning of those sentences, and have concluded that they unduly prejudiced the legality of certain referral arrangements which cannot be determined without consideration of the relevant factors and practice patterns described above."

(New Developments) Medicare and Medicaid Guide (CCH), ¶34,545, p. 9691 (April 1985).

This Court has frequently recognized that an agency's interpretation of the statute it is charged with enforcing, while not conclusive, is entitled to great weight. *See, e.g., Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 52 U.S.L.W. 4845, 4847 (U.S. June 25, 1984) (No. 82-1005) (and cases cited therein). While HCFA's interpretation of this Act is not entirely clear, its change of position in April 1985, from the position it publicly took in September 1984, is telling. The primary issue to be resolved in such cases is, in the language of the agency, "whether payments made to the [provider] for any services performed include compensation for the referral of patients to the supplier." Medicare and Medicaid Guide (CCH), *supra*, at ¶34, 127, p. 10,047 (September 1984).

When considered in light of the HCFA position as expressed in its most recent pronouncement, the factual error of the court below concerning the relative amounts of referral physician compensation stemming from direct billing by the referral physician as compared with joint billing by Cardio-Med assumes increased proportion. Congress did not amend and broaden the statutory language via the 1977 amendments so as to criminalize the conduct which was proved to have occurred in this case.

In reaching its "any purpose" holding, the court below defined "remunerates" as meaning "to pay an equivalent for service". 760 F.2d at 71. This is not, however, the only definition of the word"remunerate". The word "remunerate" is defined by *The Random House Dictionary of the English Language* (1967) (p. 1214) as meaning "to pay, recompence or reward for work, trouble, etc. . . . [.]" Payment as a reward for a referral is exactly what Congress intended to prohibit, and HCFA correctly so understood in its revised intermediary letter discussed above.

Finally, the Third Circuit's reliance upon the Seventh Circuit's prior decision in *United States v. Hancock*, 604 F.2d 999 (7th Cir. 1979) (applying law prior to 1977 amendments), is inappropriate. There appellants pleaded *nolo contendere* to indictments charging that they solicited and received kickbacks for referrals of blood and tissue specimens. By pleading *nolo contendere*, as noted by the *Hancock* Court, they admitted the well pleaded allegations in the indictment. 604 F.2d at 1001. Having admitted the"corrupt" nature of the payments by the pleas, the appellants clearly admitted violations of the Medicaid fraud statute.[15]

Because the construction of the important Medicare fraud statute, as amended, has implications for the entire health care provider community which are far reaching, plenary review of the correct interpretation of this Act is appropriate by this Court and the Petition for Certiorari should be granted.

B. The False Statements Counts.

As discussed above, Petitioner was convicted of six counts of having violated 18 U.S.C. §1001. Petitioner had requested the trial court to submit the issue of materiality, one of the elements of the offense, to the jury. The trial court viewed the materiality element as similar to the materiality element contained in the perjury statute (18 U.S.C. §1623) and ruled that as a matter of law the questioned statements were material, thus denying to Petitioner the jury's consideration of this important

15. The Medicaid fraud provisions, codified at 42 U.S.C. §1396-h(b)(1), are identical to the Medicare fraud provisions. The court below correctly decided this point, 760 F.2d at 72, n. 1. The *Hancock* reasoning, cited with approval by the court below, to the effect that "referral fees" are criminal because they add to the legitimate cost of the Medicare (and Medicaid) programs, was also correct. In this case, the evidence concerning added program costs is critically absent.

element of the offense. The court below affirmed, holding that materiality is a question of law to be decided by the court and not a question of fact to be decided by the jury.

Pursuant to Supreme Court rule 17.1(a), *certiorari* should be granted to review the decision of the court below because the courts of appeals have rendered decisions which conflict on this precise issue.

The Tenth Circuit (*United States v. Irwin*, 654 F.2d 671, 677 n. 8 (10th Cir. 1981)) and the Ninth Circuit (*United States v. Valdez*, 594 F.2d 725, 729 (9th Cir. 1979)) have held that materiality under the false statements statute (18 U.S.C. §1001) is a factual element of the offense to be determined by the jury. On the other hand, the Second Circuit (*United States v. Bernard*, 384 F.2d 915 (2nd Cir. 1967)), the Fourth Circuit (*United States v. Ivey*, 322 F.2d 523 (4th Cir. 1963)) the Fifth Circuit (*United States v. Hausman*, 711 F.2d 615 (5th Cir. 1983)), the Seventh Circuit (*United States v. Clancy*, 276 F.2d 617 (7th Cir. 1960)), the Eighth Circuit (*United States v. Hicks*, 619 F.2d 752 (8th Cir. 1980)) and the D.C. Circuit (*Weinstock v. United States*, 231 F.2d 699 (D.C. Cir. 1956)) were joined by the court below, 760 F.2d at 73, in holding that materiality, while an essential element of the offense, is an issue of law to be decided by the court.

The decision of the court below also conflicts with the decision of this Court in *In Re Winship*, 397 U.S. 358 (1970). *Winship* recognized that it is a fundamental principle of American criminal jurisprudence, stemming from the Fifth and Fourteenth Amendments to the United States Constitution, that the government is required to prove each and every element of a charged offense beyond a reasonable doubt. The court below, in its ruling, violated this fundamental principle.

Because of the conflicting decisions of the federal courts of appeals on this precise issue, it is appropriate for this Court to grant *certiorari* so as to resolve this split of decisional authority.

C. A Hearing Concerning Off The Record Communications With Jurors Was Improperly Denied.

As early as 1892, this Court recognized in *Mattox v. United States*, 146 U.S. 140, 150 (1892), that "[p]rivate communications, possibly prejudicial, between jurors and . . . witnesses. . . are *absolutely* forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear" (emphasis supplied). More recently, in *United States v. Remmer*, 347 U.S. 227, 229 (1954) (emphasis added), this Court opined:

> "In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, *deemed presumptively prejudicial*, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and *hearing of the defendant*, that such contact with the juror was harmless to the defendant."

United States v. Remmer, 347 U.S. 227, 229 (1954) (emphasis added).

Petitioner's right to a trial in connection with federal criminal charges includes, as a constitutional matter, the right to an impartial jury. Contact with jurors outside of the normal adversary process raises questions concerning the continued impartiality of such jurors. *See, e.g., Nebraska Press Association v. Stuart*, 427 U.S. 539, 551 (1976); *Duncan v. Louisiana*, 391 U.S. 145 (1968).

This important principle of law arises in Petitioner's case as follows. During the rebuttal testimony of government witness Antoinette Revel, a Pennsylvania Blue Shield employee who had numerous pre-indictment conversations with Petitioner concerning Petitioner's billing practices, a sidebar conference was held on the record. Immediately following this sidebar conference, Petitioner's trial counsel was advised by a courtroom observer that it appeared that the witness had made statements to the jury, unbeknownst to the court and to counsel, and not on the record.[16] The problem was immediately called to the attention of the trial court, which conducted a very brief colloquy[17] out of the presence of the jury. Having conducted this short colloquy with the witness out of the presence of the jury, the trial court determined that no error had occurred and trial continued.[18] Thereafter, in timely filed post-trial mo-

16. During the sidebar conference, of course, the official court reporter was at sidebar and not in close physical proximity to the witness stand.

17. The entire colloquy was as follows:

"THE COURT: Now, did you say anthing to the jury while we were at side bar?
MS. REVEL: No, Sir.
THE COURT: The statement has been made that you looked at the jury, smiled and said, "I never said that." Did you do that?
MS. REVEL: I certainly did not."

18. In the lower court the government urged that Petitioner effectively waived this issue. The trial record reflects that after Ms. Revel was questioned by Judge O'Neill concerning her communication with the jury, the following transpired:

"THE COURT: All right. Thank you. Anything else?
"MR. RUTTER: I am satisfied, Your Honor."

(A. 782). This reply by trial counsel does not amount to an effective waiver of Petitioner's right to further inquiry into the allegation of jury tampering. An effective waiver, at the very least, must reflect the precise issue being waived. Counsel's general statement of satisfaction cannot and does not amount to a waiver of the Petitioner's right to an evidentiary hearing based upon a violation of Petitioner's constitutional right to a fair and impartial jury.

tions, Petitioner contended that a complete record was necessary in order to ascertain whether communications had in fact occurred, as had been suggested by the court observers, including a request that the hearing include testimony by the jurors themselves. This request for a hearing was refused by the trial court without opinion (A11) and this ruling was left undisturbed by the court below without explication.

Other courts of appeals which have addressed a criminal defendant's right to an impartial jury in the context of "off-the-record" communications with the jury have uniformly held that, in situations similar to that presented by Petitioner's case, a hearing must be conducted so as to create a record for proper decision.[19]

Certiorari should be granted to review the decision of the court below because that decision conflicts with the decisions of this Court in *Remmer, supra,* and *Maddox, supra,* and because the decision of the court below conflicts with numerous decisions by other courts of appeals.

19. *See, e.g., United States v. Moon,* 718 F.2d 1210, 1234 (2nd Cir. 1983), cert. denied, 52 U.S.L.W. 3828 (U.S. May 14, 1984) (No. 83-1242); *United States v. Hines,* 717 F.2d 1481 (4th Cir. 1983), cert. denied sub nom, *United States v. Peed,* 52 U.S.L.W. 3861 (U.S. May 29, 1984) (No. 83-1138); *United States v. Phillips,* 664 F.2d 971 (5th Cir. 1981), cert. denied sub nom, *United States v. Meinster and Myers,* 457 U.S. 1136 (1982), cert. denied sub nom, *United States v. Platshorn,* 459 U.S. 906 (1982); *Owen v. Duckworth,* 727 F.2d 643 (7th Cir. 1984); *United States v. Crisco,* 725 F.2d 1228 (9th Cir. 1984).

X. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court to grant a Writ of Certiorari and accept plenary review of this case on the merits.

Respectfully submitted,

RUTTER, TURNER & STEIN

By _____
Thomas B. Rutter

By _____
Alan A. Turner
Counsel for Petitioner A. Alvin Greber

UNITED STATES of America, Appellee,

v.

A. Alvin GREBER, Appellant

No. 84-1546.

United States Court of Appeals,
Third Circuit.

Argued Feb. 25, 1985.

Decided April 30, 1985.

As Amended May 15, 1985.

Thomas B. Rutter (argued), Rutter, Turner & Stein, Philadelphia, Pa., for appellant.

Edward S. G. Dennis, Jr., U.S. Atty., Walter S. Batty, Jr., Asst. U.S. Atty., Chief of Appeals, Gregory P. Miller, Asst. U.S. Atty., Chief, Crim. Div., Glenn B. Bronson (argued), Asst. U.S. Atty., Philadelphia, Pa., for appellee.

Before WEIS, BECKER and WISDOM,* Circuit Judges.

OPINION OF THE COURT

WEIS, Circuit Judge.

In this appeal, defendant argues that payments made to a physician for professional services in connection with tests performed by a laboratory cannot be the basis of medicare fraud. We do not agree and hold that if one purpose of the payment was to induce future referrals, the medicare statute has been violated. We also hold that the materiality of utterances charged to be within the false statement statute is an essential element of the crime to be decided by the trial judge as a matter of law.

*The Honorable John Minor Wisdom, Circuit Judge, United States Court of Appeals for the Fifth Circuit, sitting by designation.

We find the district court's rulings consistent with our determinations and accordingly will affirm.

After a jury trial, defendant was convicted on 20 of 23 counts in an indictment charging violations of the mail fraud, Medicare fraud, and false statement statutes. Post-trial motions were denied, and defendant has appealed.

Defendant is an osteopathic physician who is board certified in cardiology. In addition to hospital staff and teaching positions, he was the president of Cardio-Med, Inc., an organization which he formed. The company provides physicians with diagnostic services, one of which uses a Holter-monitor. This device, worn for approximately 24 hours, records the patient's cardiac activity on a tape. A computer operated by a cardiac technician scans the tape, and the data is later correlated with an activity diary the patient maintains while wearing the monitor.

Cardio-Med billed Medicare for the monitor service and, when payment was received, forwarded a portion to the referring physician. The government charged that the referral fee was 40 percent of the Medicare payment, not to exceed $65 per patient.

Based on Cardio-Med's billing practices, counts 18-23 of the indictment charged defendant with having tendered remuneration or kickbacks to the referring physicians in violation of 42 U.S.C. §1395nn(b)(2)(B) (1982).

Counts 12 through 17 alleged that defendant made false statements to Medicare in violation of 18 U.S.C. §1001 (1982). Defendant submitted claim forms representing that the Holter-monitors had been operated for eight hours or more when in fact the devices had been used for a much shorter time. Medicare required at least eight hours of operation to qualify for payment.

Counts 5 to 11 charged mail fraud. According to the indictment, defendant caused Cardio-Med to bill Medicare for monitorings which were medically unnecessary.

Mail fraud was also charged in counts 1 to 4. Defendant allegedly used the mail to bill for hospital visits he never made.

The proof as to the Medicare fraud counts (18-23) was that defendant had paid a Dr. Avallone and other physicians "interpretation fees" for the doctors' initial consultation services, as well as for explaining the test results to the patients. There was evidence that physicians received "interpretation fees" even though defendant had actually evaluated the monitoring data. Moreover, the fixed percentage paid to the referring physician was more than Medicare allowed for such services.

The government also introduced testimony defendant had given in an earlier civil proceeding. In that case, he had testified that ". . . if the doctor didn't get his consulting fee, he wouldn't be using our service. So the doctor got a consulting fee." In addition, defendant told physicians at a hospital that the Board of Censors of the Philadelphia County Medical Society had said the referral fee was legitimate if the physician shared the responsibility for the report. Actually, the Society had stated that there should be separate bills because "for the monitor company to offer payment to the physicians . . . is not considered to be the method of choice."

The evidence as to mail fraud was that defendant repeatedly ordered monitors for his own patients even though use of the device was not medically indicated. As a prerequisite for payment, Medicare requires that the service be medically indicated.

The Department of Health and Human Services had promulgated a rule providing that it would pay for Holter-monitoring only if it was in operation for eight hours or more. Defendant routinely certified that the temporal condition had been met, although in fact it had not.

On appeal, defendant raises several alleged trial errors. He presses more strongly, however, his contentions

that the evidence was insufficient to support the guilty verdict on the Medicare fraud counts, and that the charge to the jury on that issue was not correct. As to the false statement counts, he argues that the materiality element should have been submitted to the jury rather than being decided as a matter of law by the court.

I. MEDICARE FRAUD

The Medicare fraud statute was amended by P.L. 95-142, 91 Stat. 1183 (1977). Congress, concerned with the growing problem of fraud and abuse in the system, wished to strengthen the penalties to enhance the deterrent effect of the statute. To achieve this purpose, the crime was upgraded from a misdemeanor to a felony.

Another aim of the amendments was to address the complaints of the United States Attorneys who were responsible for prosecuting fraud cases. They informed Congress that the language of the predecessor statute was "unclear and needed clarification." H.Rep. No. 393, PART II, 95 Cong., 1st Sess. 53, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 3039, 3055.

A particular concern was the practice of giving "kickbacks" to encourage the referal of work. Testimony before the Congressional committee was that "physicians often determine which laboratories would do the test work for their medicaid patients by the amount of the kickbacks and rebates offered by the laboratory. . . . Kickbacks take a number of forms including cash, long-term credit arrangements, gifts, supplies and equipment, and the furnishing of business machines." *Id.* at 3048-3049.

To remedy the deficiencies in the statute and achieve more certainty, the present version of 42 U.S.C. §1395nn(b)(2) was enacted. It provides:

> "whoever knowingly and willfully offers or pays any remuneration (including any kickback, bribe or rebate) directly or indirectly, overtly or covertly in cash

> or in kind to induce such person—
>
> * * * * * *
>
> (B) to purchase, lease, order, or arrange for or recommend purchasing . . . or ordering any . . . service or item for which payment may be made . . . under this title, shall be guilty of a felony."

The district judge instructed the jury that the government was required to prove that Cardio-Med paid to Dr. Avallone some part of the amount received from Medicare; that defendant caused Cardio-Med to make the payment; and did so knowingly and willfully as well as with the intent to induce Dr. Avallone to use Cardio-Med's services for patients covered by Medicare. The judge further charged that even if the physician interpreting the test did so as a consultant to Cardio-Med, that fact was immaterial if a purpose of the fee was to induce the ordering of services from Cardio-Med.

Defendant contends that the charge was erroneous. He insists that absent a showing that the only purpose behind the fee was to improperly induce future services, compensating a physician for services actually rendered could not be a violation of the statute.

The government argues that Congress intended to combat financial incentives to physicians for ordering particular services patients did not require.

The language and purpose of the statute support the government's view. Even if the physician performs some service for the money received, the potential for unnecessary drain on the Medicare system remains. The statute is aimed at the inducement factor.

The text refers to "any remuneration." That includes not only sums for which no actual service was performed but also those amounts for which some professional time was expended. "Remunerates" is defined as "to pay an equivalent for service." Webster Third New International Dictionary (1966). By including such items as kickbacks and bribes, the statute expands

"remuneration" to cover situations where no service is performed. That a particular payment was a remuneration (which implies that a service was rendered) rather than a kickback, does not foreclose the possibility that a violation nevertheless could exist.

In *United States v. Hancock*, 604 F.2d 999 (7th Cir. 1979), the court applied the term "kickback" found in the predecessor statute to payments made to chiropractors by laboratories which performed blood tests. The chiropractors contended that the amounts they received were legitimate handling fees for their services in obtaining, packaging, and delivering the specimens to the laboratories and then interpreting the results. The court rejected that contention and noted, "The potential for increased costs to the Medicare-Medicaid system and misapplication of federal funds is plain, where payments for the exercise of such judgments are added to the legitimate cost of the transaction . . . [T]hese are among the evils Congress sought to prevent by enacting the kickback statutes. . . ." *Id.* at 1001.

Hancock strongly supports the government's position here, because the statute in that case did not contain the word "remuneration." The court nevertheless held that "kickback" sufficiently described the defendants' criminal activity. By adding "remuneration" to the statute in the 1977 amendment, Congress sought to make it clear that even if the transaction was not considered to be a "kickback" for which no service had been rendered, payment nevertheless violated the Act.

We are aware that in *United States v. Porter*, 591 F.2d 1048 (5th Cir. 1979), the Court of Appeals for the Fifth Circuit took a more narrow view of "kickback" than did the court in *Hancock*. *Porter's* interpretation of the predecessor statute which did not include "remuneration" is neither binding nor persuasive. We agree with the Court of Appeals for the Sixth Circuit, which adopted the interpretation of "kickback" used in *Hancock* and rejected that of the *Porter* case. *United*

States v. Tapert, 625 F.2d 111 (6th Cir. 1980).[1] *See also United States v. Duz-Mor Diagnostic Laboratory, Inc.*, 650 F.2d 223, 227 (9th Cir. 1981).

We conclude that the more expansive reading is consistent with the impetus for the 1977 amendments and therefore hold that the district court correctly instructed the jury. If the payments were intended to induce the physician to use Cardio-Med's services, the statute was violated, even if the payments were also intended to compensate for professional services.

A review of the record also convinces us that there was sufficient evidence to sustain the jury's verdict.

II. FALSE STATEMENTS

Defendant also argues vigorously that he is entitled to a new trial on the false statement counts because the issue of materiality was not submitted to the jury. The government produced evidence showing that on certain occasions the Holter-monitor was used for less than eight hours, but defendant certified that it had been operated for at least that length of time. As noted earlier, that certification was a prerequisite for payment by Medicare and thus the issue of materiality must be addressed.

18 U.S.C. §1001 provides that a person who "in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies . . . a material fact, or makes any false, fictitious statements or representations" shall be guilty of a crime.

Defendant's contention is divided into two parts, first, that materiality is an essential element; second,

1. Although the *Hancock* case is based on the Medicaid fraud provision found in 42 U.S.C. §1396h(b)(1), the Medicare fraud section pertinent in this case shares common language and purposes. *See Tapert*, 625 F.2d at 113 n. 1, 2. Indeed, the title of the 1977 amendments was "Medicare-Medicaid Antifraud and Abuse Amendments."

that the issue is to be decided by the jury. We consider the two points in that order.

Most of the Courts of Appeals, with the exception of the Second Circuit, have held that materiality is an essential element. *See, e.g., United States v. Irwin,* 654 F.2d 671 (10th Cir. 1981); *United States v. Valdez,* 594 F.2d 725 (9th Cir. 1979); *but see United States v. Elkin,* 731 F.2d 1005 (2d Cir. 1984).

In *United States v. Clearfield,* 358 F.Supp. 564 (E.D.Pa. 1973), Judge Becker, now of this court, included materiality as one element of the offense. In the context of 18 U.S.C. §1014, which prohibits false statements in loan applications, we had stated that materiality requires that the statements must have the capacity to influence; actual use of the representations in the decision-making is not necessary. *United States v. Goberman,* 458 F.2d 226 (3d Cir. 1972). Adopting that rationale, Judge Becker phrased "[t]he test for materiality [under §1001 as] whether the statement has a natural tendency to influence or be capable of influencing the agency, not whether it, in fact, did so influence it." 358 F.Supp. 574 n. 23.

In *United States v. Slawik,* 548 F.2d 75, 79 (3d Cir. 1977), we held that materiality is an essential element of the perjury statute. 18 U.S.C. §1625. We see no reason why the same burden should not be imposed on the prosecution in a false statement case as well. *See United States v. Protch,* 481 F.2d 647 (3d Cir. 1973). *Cf. United States v. Silver,* 235 F.2d 375, 377 (2d Cir. 1956) (materiality not an element of false statements but is for concealment offense). We hold, therefore, that materiality is an essential element of a §1001 offense and join the majority of courts which have so held.

The record here contains enough evidence to support the district judge's ruling that the certifications to Medicare were material. It is not questioned that the statements that the monitors were being used for more than eight hours led to payment by the agency. If the

elapsed time had been accurately reported, Medicare would not have allowed the claims. The element of materiality, therefore, is satisfied. The question remains, however, whether judge or jury was to make the determination. Our court has not yet specifically taken a position on the question, but in *United States v. Slawik* we held that in a perjury prosecution materiality is "a question of law, decision upon which is reserved to the court." 548 F.2d at 79.

Building upon the Supreme Court's holding in *Sinclair v. United States,* 279 U.S. 263, 49 S.Ct. 268, 73 L.Ed. 692 (1929), the majority of the Courts of Appeals have adopted the same position in false statement cases under §1001. In *Sinclair,* the Court reviewed a judgment against a defendant for refusing to answer the questions of a Congressional committee. The Court ruled that "pertinency" under the applicable statute "was rightly decided . . . as one of law . . . That question . . . is not essentially different from the question as to materiality of false testimony charged as perjury in prosecution for that crime. . . . [T]he materiality of what is falsely sworn, when an element in the crime of perjury is one for the court." *Id.* at 298, 49 S.Ct. at 273.

Cases applying the same rule to §1001 prosecutions have been decided by the courts in the Second, Fourth, Fifth, Seventh, Eighth, and D.C. Circuits.[2] We join that majority and accordingly reject the defendant's contention that the issue of materiality should have been submitted to the jury.

---

2. *United States v. Bernard,* 384 F.2d 915 (2d Cir. 1967); *United States v. Ivey,* 322 F.2d 523 (4th Cir. 1963); *United States v. Hausman,* 711 F.2d 615 (5th Cir. 1983); *United States v. Clancy,* 276 F.2d 617 (7th Cir. 1960); *United States v. Hicks,* 619 F.2d 752 (8th Cir. 1980); *Weinstock v. United States,* 231 F.2d 699 (D.C. Cir. 1956). *Contra United States v. Irwin,* 654 F.2d 671, 677 n. 8 (10th Cir. 1981); *United States v. Valdez,* 594 F.2d 725, 729 (9th Cir. 1979).

[3] Defendant also contends that the district court erred in failing to conduct hearings into an off-the-record comment allegedly made by a witness to the jury. We are persuaded that the trial judge promptly and properly acted on the matter and no further hearing was necessary. We also find no merit in the defendant's complaint that an F.B.I. agent interviewed a potential expert witness for the defense before trial. The witness was not called, and defendant has demonstrated neither impropriety nor injury, nor necessity for a hearing.

Having carefully reviewed all of the defendant's allegations, we find no reversible error. Accordingly, the judgment of the district court will be affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	CRIMINAL NO.
	:	83-00414
A. ALVIN GREBER	:	

ORDER

AND NOW, this 11th day of September, 1984, upon consideration of defendant A. Alvin Greber's Motion For a New Trial and For Judgment of Acquittal, and the government's response thereto, it is hereby

ORDERED

that defendant's Motion is denied.

BY THE COURT

/s/ O'NEILL

J.

OPPOSITION

BRIEF

(2)

No. 85-35

In the Supreme Court of the United States

OCTOBER TERM, 1985

A. ALVIN GREBER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Acting Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

KAREN SKRIVSETH
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

17 pp

QUESTIONS PRESENTED

1. Whether petitioner, a supplier of medical equipment, committed Medicare fraud, in violation of 42 U.S.C. 1395nn(b)(2)(B), by making payments to physicians with the intent to induce them to use his services.

2. Whether the question of the materiality of petitioner's false statements under 18 U.S.C. 1001 should have been submitted to the jury.

3. Whether the district court conducted an adequate hearing with respect to an alleged off-the-record communication between a witness and the jury.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Cases—Continued:

Statutes:

Miscellaneous:

Page

Miscellaneous—Continued:

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-35

A. ALVIN GREBER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 760 F.2d 68.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1985. The petition for a writ of certiorari was filed on June 28, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on nine counts of mail fraud, in violation of 18 U.S.C. 1341, six counts of making false statements, in violation of 18 U.S.C. 1001, and five counts of Medicare fraud, in violation of 42 U.S.C. 1395nn(b)(2)(B). He was sentenced to concurrent terms of six months' imprisonment on each of

the mail fraud counts, to be followed by concurrent terms of five years' probation on each of the false statement and Medicare fraud counts, and was fined a total of $100,000 on the false statement and four of the Medicare fraud counts. The court of appeals affirmed (Pet. App. A1-A10).

1. The evidence at trial, the sufficiency of which is not in dispute, showed that petitioner was an osteopathic physician specializing in cardiology. In addition to holding various hospital positions, petitioner was the president and part-owner of Cardio-Med, Inc., an organization that provided diagnostic cardiology services to physicians. Certain of these services entailed use of a Holter monitor, a portable electrocardiograph worn by patients over an extended period of time. Pet. App. A2.

Through Cardio-Med, petitioner offered to pay and did make payments to physicians to induce them to order Cardio-Med services for their Medicare patients. Petitioner paid physicians 40% of the amount that Cardio-Med received from Medicare, up to $65 (C.A. App. 367). While he designated this as an "interpretation fee," in many instances petitioner rather than the referring physician interpreted the test results. The flat 40% payment was greater than the fee that Medicare would have paid for interpreting a Holter monitor test. Pet. App. A2-A3.

Petitioner admitted in an earlier proceeding that " 'if the doctor didn't get his consulting fee [*i.e.*, the 40% payment], he wouldn't be using our service. So the doctor got a consulting fee.' " Pet. App. A3. Although the local medical society instructed petitioner that referring physicians should bill Medicare separately for interpreting the results of Holter monitor testing, petitioner misrepresented to physicians that the society supported Cardio-Med's fee arrangement

(*ibid.*). No other Holter monitor company in the area offered a fee similar to petitioner's (C.A. App. 515-516).[1]

2. The district court instructed the jury that in order to prove Medicare fraud in violation of 42 U.S.C. 1395nn(b)(2)(B), the government must show that petitioner knowingly and willfully caused Cardio-Med to make payments to referring physicians with the intent to induce them to use Cardio-Med services for their patients (Pet. App. A5; C.A. App. 859). The court further instructed the jury that it was immaterial whether the physicians interpreted the test results, so long as "the purpose [of the fee paid by petitioner] was to induce the physicians to order services from Cardio-Med" (C.A. App. 860; see Pet. App. A5). The jury was also instructed to consider "all of the evidence as to services * * * performed allegedly by the physicians for the fee * * * in making [its] determination whether * * * the purpose [of the fee] was to induce the physicians to order services from Cardio-Med" (C.A. App. 860). Finally, the court instructed that if the government proved that the purpose of the fee was inducement, then "the fact that the fee may, in the mind of the defendant or the other physicians or in fact have [had] other purposes, as well, would not be relevant" (*id.* at 884).[2]

3. The court of appeals affirmed (Pet. App. A1-A10). It held that the jury was correctly instructed that "[i]f the payments were intended to induce the physician to use

---

[1]The evidence also showed that in order to obtain Medicare reimbursement, petitioner falsely stated on claim forms that certain Holter monitors had operated for more than eight hours (Pet. App. A2). The mail fraud counts, which petitioner does not contest, rested on his billings to Medicare for services that were not medically indicated and for hospital visits that he never made (*id.* at A2-A3).

[2]The jury was told that the court had determined as a matter of law that petitioner's statements were material for purposes of 18 U.S.C. 1001 (C.A. App. 857-858).

Cardio-Med's services, the statute was violated, even if the payments were also intended to compensate for professional services" (*id.* at A7). The court reasoned that the statutory language and purpose supported this view (*id.* at A5). It noted that petitioner's reading would permit "financial incentives to physicians for ordering particular services patients did not require," which would have "the potential for unnecessary drain on the Medicare system" (*ibid.*). The court of appeals also held that the district court correctly decided materiality under 18 U.S.C. 1001 as a matter of law (*id.* at A7-A9) and that the district court adequately inquired into an off-the-record comment allegedly made by a witness to the jury (*id.* at A10).

ARGUMENT

1. Petitioner contends chiefly (Pet. 15-25) that the district court erred by refusing to instruct the jury that he could be convicted of Medicare fraud only if he made the payments to referring physicians with the sole purpose of inducing them to use Cardio-Med's services. The court of appeals correctly held that 42 U.S.C. 1395nn(b)(2)(B) is violated where inducement is one of the purposes of the fee arrangement, even if it is not the exclusive purpose. As petitioner recognizes (Pet. 15-16), this is an issue of first impression under the 1977 amendments to the statute, and there is accordingly no conflict among the circuits. Review by this Court is unwarranted.[3]

As amended by Section 4(a) of the Medicare-Medicaid Anti-Fraud and Abuse Amendments, Pub. L. No. 95-142, 91 Stat. 1179, 42 U.S.C. 1395nn(b)(2)(B) provides:

[3]Petitioner was sentenced on the Medicare fraud counts only to probation concurrent with his sentence on the false statement counts and to a portion of his total fine (see page 2, *supra*).

> Whoever knowingly and willfully offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person —
>
> * * * * *
>
> (B) to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under [Medicare],
>
> shall be guilty of a felony * * *.

The legislative history makes clear that the amendment defined the offense broadly to reach any payment "in return for purchasing, leasing, or ordering, or arranging for * * * services." H.R. Rep. 95-393, 95th Cong., 1st Sess. Pt. II, at 53 (1977). Congress was particularly concerned with physicians' common practice of "determin[ing] which laboratories would do the test work for their medicaid patients by the amount of the kickbacks and rebates offered by the laboratory" (*id.* at 46).

Nothing in the statutory language or legislative history suggests the narrow construction urged by petitioner.[4] The jury found that petitioner harbored the intent to induce physicians to order through Cardio-Med by making payments to them for doing so. This finding, which petitioner does not challenge, is ample to satisfy the statutory

[4]Petitioner's reliance (Pet. 19 n.12 (citation omitted)) on Congress's desire not to criminalize conduct of " 'honest, extremely dedicated medical providers' " is particularly misplaced in view of the facts as found by the jury in this case. His reliance (Pet. 19) on the congressional intent to focus on substance rather than form is also ill-founded. Notwithstanding that he denominated the payments as professional fees, the substance of petitioner's payment arrangements was that he provided kickbacks to physicians who placed orders with Cardio-Med.

requirement that he "knowingly and willfully offer[ed] or pa[id] * * * remuneration" to physicians "to * * * order" his services. See generally W. La Fave & A. Scott, *Criminal Law* 200 (1972) (footnote omitted) ("so long as the defendant has the intention required by the definition of the crime, it is immaterial that he may also have had some other intention"); see also *Anderson* v. *United States*, 417 U.S. 211, 226 (1974) (conspiracy with multiple purposes unlawful so long as one of the purposes violates federal law).

Petitioner makes two arguments. First, he contends (Pet. 18, 20) that the payments to referring physicians did not increase Medicare costs because they reflected the fair market value of the referring physicians' interpretation services. This claim simply is not borne out by the record. See, *e.g.*, C.A. App. 369-370, 456-457, 517-520 (referring physicians were not required to, and often did not, perform any services in order to obtain their "fee"). Moreover, the jury was instructed to consider the extent to which petitioner's payments reflected services rendered by referring physicians in determining whether petitioner made the payments with an improper purpose (see page 3, *supra*). Finally, even if the referring physicians did perform some professional services for their fees, petitioner's arrangements nonetheless stood as an improper inducement to order services from Cardio-Med, carrying "the potential for unnecessary drain on the Medicare system" (Pet. App. A5), because the arrangements were more advantageous to physicians than billing Medicare directly for their own services. See generally *United States* v. *Tapert*, 625 F.2d 111 (6th Cir.), cert. denied, 449 U.S. 952 and 1034 (1980); *United States* v. *Hancock*, 604 F.2d 999, 1001 (7th Cir.), cert. denied, 444 U.S. 991 (1979).[5]

[5]Petitioner's string of hypotheticals (Pet. 20-22) is beside the point. If a defendant harbors an improper purpose in making remunerations to physicians — if payments are made "knowingly and willfully" to "induce" referrals — then the statute is violated. If no improper purpose is present, then it is not. Moreover, the hypotheticals refer to situations where payments represent full value for services rendered, unlike the present case.

Petitioner also attempts to support his view of the statute by relying (Pet. 22-24) on an interpretation issued by the Health Care Financing Administration (HCFA). Petitioner argues that HCFA's interpretive letter reads the statute to permit referral payments where they represent the fair market value of services rendered by the referring physician. Even accepting this reading of HCFA's letter, however, petitioner's reliance on it is misplaced for two reasons. First, petitioner offered to and did make payments even where the referring physician provided no independent services (see pages 2, 6 *supra*). Second, HCFA's letter related to the peculiarities of common fee arrangements between durable medical equipment suppliers and respiratory therapists, under which therapists could be under contract with or employed by suppliers. See [1985 Transfer Binder] Medicare and Medicaid Guide (CCH) ¶ 34,544. Such arrangements are not common with respect to Holter monitor services (see page 3, *supra*), nor were petitioner's referring physicians in the same relationship with him as were the suppliers and therapists covered by HCFA's letter.[6]

2. Petitioner argues next (Pet. 25-27) that the question of the materiality of his false statements under 18 U.S.C. 1001 should have been submitted to the jury. This Court has repeatedly denied certiorari in cases presenting the same

[6]Indeed, HCFA made it plain that conduct such as petitioner's would in its view violate the statute: payments "intended to induce the referral of Medicare (or Medicaid) patients to the supplier would clearly violate the illegal remuneration provisions of the Act." [1985 Transfer Binder] Medicare and Medicaid Guide (CCH) ¶ 34,544, at 9691. Petitioner had also been informed by his local medical society of the improper nature of his practices (see page 2, *supra*).

contention. See, *e.g., United States* v. *Elkin*, 731 F.2d 1005 (2d Cir. 1984), cert. denied, No. 83-1848 (Oct. 1, 1984); *United States* v. *Abadi*, 706 F.2d 178 (6th Cir.), cert. denied, 464 U.S. 821 (1983). There is no reason for a different result here.

Petitioner recognizes (Pet. 26) that the court of appeals' holding that materiality is an issue of law is consistent with the law in the majority of circuits. See, *e.g., Nilson Van & Storage Co.* v. *Marsh*, 755 F.2d 362, 367 (4th Cir. 1985), petition for cert. pending, No. 84-1771; *United States* v. *Elkin*, 731 F.2d at 1009; *United States* v. *Abadi*, 706 F.2d at 180; *United States* v. *Richmond*, 700 F.2d 1183, 1188 (8th Cir. 1983); *United States* v. *Fern*, 696 F.2d 1269, 1274 (11th Cir. 1983); *United States* v. *McIntosh*, 655 F.2d 80, 82 (5th Cir. 1981), cert. denied, 455 U.S. 948 (1982); *United States* v. *Clancy*, 276 F.2d 617, 635 (7th Cir. 1960); *Weinstock* v. *United States*, 231 F.2d 699, 703 (D.C. Cir. 1956). The holding also accords with this Court's recognition that the materiality of false statements generally is a question for the court (*Sinclair* v. *United States*, 279 U.S. 263, 298 (1929)), and with the generally accepted pattern jury instructions (see 2 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 28.09 (3d ed. 1977 & Supp. 1981)). Petitioner contends, however, that the Ninth and Tenth Circuits have approved the practice of submitting the question of materiality to the jury (citing *United States* v. *Irwin*, 654 F.2d 671, 677 n.8 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982), and *United States* v. *Valdez*, 594 F.2d 725, 729 (9th Cir. 1979)) and that this conflict warrants resolution by this Court.

Petitioner has cited no case, however, and we are aware of none, in which a court has overturned a conviction under 18 U.S.C. 1001 on the ground that the issue of materiality was not submitted to the jury. The Tenth Circuit has approved the practice of submitting it to the jury (*Irwin*, 654

F.2d at 677 n.8); the Ninth Circuit has characterized the failure to do so as error, but it nevertheless affirmed the convictions in question because materiality had been so clearly established (*Valdez*, 594 F.2d at 729). In this case, petitioner does not contend that his false statements on the Medicare claim forms were not material, and their materiality cannot be doubted. Since the information petitioner provided on the claim forms was the basis on which the Medicare payments were made (Pet. App. A8-A9), it is clear that his statements "had a 'natural tendency to influence, or [were] capable of affecting or influencing, a governmental function' " (*United States* v. *Diaz*, 690 F.2d 1352, 1357 (11th Cir. 1982), quoting *United States* v. *Markham*, 537 F.2d 187, 196 (5th Cir. 1976), cert. denied, 429 U.S. 1041 (1977)). Where the materiality of petitioner's false statements is so clearly established, there is no reason to believe that any other court of appeals would have granted petitioner the relief he seeks. Thus, to whatever extent a conflict may exist,[7] the present case does not provide an appropriate occasion for this Court to address it.

3. Finally, petitioner contends (Pet. 27-29) that the district court failed to conduct an adequate hearing into an alleged off-the-record communication between a witness and the jury. The court of appeals correctly rejected this factbound contention (Pet. App. A10), and it plainly merits no further review.

---

[7]The Ninth Circuit has recently held that materiality is an issue of law to be decided by the court in prosecutions for false statements under 26 U.S.C. 7206(1) (*United States* v. *Flake*, 746 F.2d 535, 537 (1984), cert. denied, No. 84-6013 (Feb. 19, 1985)), and in prosecutions for perjury under 18 U.S.C. 1623 (*United States* v. *Prantil*, 756 F.2d 759, 769 1985)). It is not clear whether these holdings presage acceptance of the prevailing view on false statement prosecutions.

The district court "promptly and properly acted on the matter" (Pet. App. A10) by questioning the witness out of the presence of the jury (C.A. App. 781-782):

[The court:] Now, did you say anything to the jury while we were at side bar?

[Witness:] No, sir.

[The court:] The statement has been made that you looked at the jury, smiled and said "I never said that." Did you do that?

[Witness:] I certainly did not.

[The court:] All right. Thank you. Anything else?

[Counsel for petitioner:] I am satisfied, Your Honor.

This resolution of the matter, which counsel for petitioner approved, plainly was sufficient to protect petitioner's rights.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

KAREN SKRIVSETH
Attorney

SEPTEMBER 1985

DOJ-1985-09

OPINION

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

SUPREME COURT OF THE UNITED STATES

A. ALVIN GREBER *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 85-35. Decided November 12, 1985

The petition for writ of certiorari is denied.

JUSTICE WHITE, dissenting.

Petitioner Greber was convicted in United States District Court on several counts of making false statements "in any matter within the jurisdiction of any department or agency of the United States." See 18 U. S. C. § 1001. In connection with these convictions, the District Court refused to submit the question of the materiality of Greber's statements to the jury, holding that materiality was a question of law to be decided by the court. The United States Court of Appeals for the Third Circuit affirmed the convictions and upheld the District Court's determination that materiality was a question of law. See 760 F. 2d 68, 72–73. Other Circuits have also concluded that materiality is a question of law. See, *e. g.*, *Nilson Van & Storage Co.* v. *Marsh*, 755 F. 2d 362, 367 (CA4), cert. denied, —— U. S. —— (1985); *United States* v. *Abadi*, 706 F. 2d 178, 180 (CA6), cert. denied, 464 U. S. 821 (1983). Two Circuits, however, have held that materiality under § 1001 is a question of fact and should thus be submitted to the jury. See *United States* v. *Irwin*, 654 F. 2d 671, 677, n. 8 (CA10 1981); *United States* v. *Valdez*, 594 F. 2d 725, 729 (CA9 1979). I would grant certiorari to resolve this conflict.